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Preface

This publication is one in a series of monthly pamphlets entitled "Digests of Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code § 3529 (formerly 31 U.S.C. §§ 74 and 82d). Decisions concerning claims are issued in accordance with 31 U.S. Code § 3702 (formerly 31 U.S.C. § 71). Decisions on the validity of contract awards are rendered pursuant to the Competition in Contracting Act, Pub. L. 98-369, July 18, 1984. Decisions in this pamphlet are presented in digest form. When requesting individual copies of these decisions, which are available in full text, cite them by the file number and date, e.g., B-229329.2, Sept. 29, 1989. Approximately 10 percent of GAO's decisions are published in full text as the Decisions of the Comptroller General of the United States. Copies of these decisions are available in individual copies, in monthly pamphlets and in annual volumes. Decisions in these volumes should be cited by volume, page number and year issued, e.g., 68 Comp. Gen. 644 (1989).

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Appropriations/Financial Management

B-245032, March 9, 1992***

Appropriations/Financial Management

Federal Assistance

- **Grant recipients**
- ■ **Small businesses**
- ■ ■ **Profits**

The Department of Health and Human Services should follow a Small Business Administration policy directive providing for payment of a profit to grant recipients in the context of a Small Business Innovation Research Program. The Department's regulation prohibiting the payment of profits to for-profit organizations is superseded because the Administration's policy directive is mandated under the Small Business Innovation Development Act of 1982 and the provision of profits is a proper exercise of discretion by the agency charged by Congress to oversee the program.

B-247908, March 9, 1992

Appropriations/Financial Management

Appropriation Availability

- **Specific purpose restrictions**
- ■ **Applicability**
- ■ ■ **Congress**

Appropriations/Financial Management

Appropriation Availability

- **Time availability**
- ■ **Time restrictions**
- ■ ■ **Fiscal-year appropriation**

Article I, section 8, clause 12 of the U.S. Constitution does not impose a general restriction on the Congress's power to appropriate funds. Clause 12 applies only to appropriations "to raise and support armies," and provides that such appropriations may not be made for a period longer than 2 years.

B-245708, March 11, 1992

Appropriations/Financial Management

Appropriation Availability

- **Purpose availability**
- ■ **Specific purpose restrictions**
- ■ ■ **Credits**
- ■ ■ ■ **Charities**

The Acting Chief Financial Officer, Department of Energy, is advised, in response to a request to donate frequent flyer mileage credits to a charitable organization such as the "Miles for Kids in

Need" program, that the disposal of personal property is within the jurisdiction of the Administrator, General Services Administration (GSA), and that GSA regulations exist for such disposal in 41 C.F.R. § 101-25.103.4 (1991). Issue remains as to whether such credits become surplus since there is always potential for their use up to the date of expiration. Specific questions concerning specific charities should be addressed to the Administrator, GSA. Agency may wish to hold further questions pertaining to frequent flyer mileage credits in abeyance pending GAO and GSA consideration of request from Senior Executives Association.

B-247635, March 13, 1992

Appropriations/Financial Management

Claims By Government

- Past due accounts
- ■ Interest
- ■ ■ State/local governments

GAO recommends that the Justice Department seek *certiorari* on the decision in *Texas v. United States*, No. 91-8042, Slip. Op. (5th Cir. Jan. 28, 1992), because it would unjustifiably abrogate the federal government's common law authority to assess interest on delinquent debts owed to the United States by units of state and local government.

B-246660, March 20, 1992

Appropriations/Financial Management

Judgment Payments

- Permanent/indefinite appropriation
- ■ Purpose availability
- ■ ■ Real property
- ■ ■ ■ Settlement offers

Claims Group should not certify payment from the Judgment Fund, 31 U.S.C. § 1304 (1988), of the settlement of *Santa Fe Pacific R.R. v. Secretary of the Interior* in which the plaintiff sought to compel the government to grant a patent to some land located in a wildlife refuge in the Prescott National Forest where the claimant planned to do commercial development. The settlement allows the government to purchase the plaintiff's rights to the land in question in order to protect the integrity of the wildlife refuge, but agency appropriations, rather than the Judgment Fund, are normally used for intentional land acquisitions.

B-247164, March 20, 1992

Appropriations/Financial Management

Accountable Officers

- Cashiers
- ■ Relief
- ■ ■ Illegal/improper payments
- ■ ■ ■ Forgeries

Appropriations/Financial Management

Accountable Officers

- Disbursing officers
- ■ Relief
- ■ ■ Illegal/improper payments
- ■ ■ ■ Forgeries

Supervisory U.S. Navy disbursing officer is relieved of liability for improper payment to individual who forged a receipt for the payment where the officer maintained and supervised an adequate

system of procedures designed to prevent such improper payments. The agency did not request relief of the subordinate cashier who made the improper payment.

Appropriations/Financial Management

Accountable Officers

- Cashiers
- ■ Liability
- ■ ■ Statutes of limitation
- ■ ■ ■ Suspension

Where the 3-year statute of limitations set forth in 31 U.S.C. § 3526(c) has almost expired, we are suspending the running of that period to allow the submission of additional information regarding the liability of the cashier for making improper payment or to initiate collection action against the cashier.

B-246004, March 23, 1992

Appropriations/Financial Management

Claims Against Government

- Meritorious claims
- ■ Submission

A manpower shortage category appointee received erroneous advice from agency officials regarding travel and transportation entitlements to first duty station. That erroneous information was reiterated in the employee's travel authorization. Under 5 U.S.C. § 5723 (1988), manpower shortage category appointees have limited entitlements and any expenses incurred in excess of those entitlements may not be reimbursed. However, in view of the amount of expenses incurred by the employee in good faith reliance on the erroneous representations of agency officials, we are submitting the matter to the Congress under 31 U.S.C. § 3702(d) (1988) as a meritorious claim.

Civilian Personnel

B-246730, March 3, 1992

Civilian Personnel

Compensation

- Classification
 - ■ Appeals
 - ■ ■ GAO review
-

Civilian Personnel

Compensation

- Classification
- ■ Error allegation
- ■ ■ Allegation substantiation

The claims of two former employees who allege that their agency improperly classified them as intermittent workers instead of part-time employees are denied. Though the employees allege that they worked 40-hour weeks with scheduled days off, they produced no evidence that they were assigned specific schedules in advance of the administrative workweek. Further, the agency's decision to hire subsequent workers as full-time employees does not establish that the employees in the instant case had been given advance schedules.

B-245650, March 5, 1992

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Finance charges

A transferred employee who sold his residence at his old duty station may not be reimbursed the amount he agreed to pay of the purchaser's closing costs since section 302-6.2(d) and (f) of the federal travel regulations only authorize reimbursement of the seller's closing costs. By contributing towards the purchaser's closing costs, the seller in effect reduced the selling price of his residence. To allow reimbursement would be tantamount to allowing the employee to be reimbursed for a decrease in the value of his residence due to market conditions. See 41 C.F.R. § 302-6.2(e).

B-245171, March 10, 1992

Civilian Personnel

Relocation

- Residence transaction expenses
 - ■ Miscellaneous expenses
 - ■ ■ Reimbursement
-

Civilian Personnel

Relocation

- Temporary quarters
- ■ Actual subsistence expenses
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

A transferring employee signed an agreement to lease quarters at his new duty station for temporary quarters occupancy at a specific future date at a rental of \$1,100 a month payable upon occupancy. He also was required to pay \$400 at signing as a nonrefundable deposit in exchange for the lessor agreeing to hold the residence for him. His claim that the \$400 was a prepaid part of his rent under section 302-5.4(a) of the Federal Travel Regulation is denied. The \$400 deposit to hold the residence may be reimbursed as a miscellaneous expense under FTR § 302-3.1, but, under the lease, may not be reimbursed as a lodging cost under FTR § 302-5.4(a).

Civilian Personnel

Relocation

- Taxes
- ■ Allowances
- ■ ■ Eligibility

A transferred employee, who is a federal income tax nonitemizer, questions the fact that he was required to pay a much greater income tax without reimbursement under Part 302-11 of the Federal Travel Regulation (FTR), governing the Relocation Income Tax (RIT) Allowance, because he was unable to deduct any of his moving expenses. This is due to implementation of the Tax Reform Act of 1986, which requires that these expenses may only be treated as an itemized deduction on Schedule A of the Form 1040 income tax return. This Office has no authority to grant relief to employees who do not itemize their deductions, since regulatory authority under 5 U.S.C. § 5724b (1988) has been delegated to the General Services Administration.

B-246056, March 10, 1992

Civilian Personnel

Compensation

- Advances
 - ■ Debt collection
 - ■ ■ Procedures
-

Civilian Personnel

Travel

- Advances
- ■ Debt collection
- ■ ■ Set-off
- ■ ■ ■ Reemployed annuitants

When an employee retired, he had a travel advance outstanding which was not liquidated at that time. Several years later he returned to service with the agency as a reemployed annuitant and the unliquidated advance was discovered. The agency then collected the advance by setoff against

reimbursement due the employee for travel performed as a reemployed annuitant. The agency's collection action was authorized by 5 U.S.C. § 5705.

B-245708, March 11, 1992

Civilian Personnel

Travel

- Bonuses
- ■ Gifts/donations
- ■ ■ Charities

The Acting Chief Financial Officer, Department of Energy, is advised, in response to a request to donate frequent flyer mileage credits to a charitable organization such as the "Miles for Kids in Need" program, that the disposal of personal property is within the jurisdiction of the Administrator, General Services Administration (GSA), and that GSA regulations exist for such disposal in 41 C.F.R. § 101-25.103.4 (1991). Issue remains as to whether such credits become surplus since there is always potential for their use up to the date of expiration. Specific questions concerning specific charities should be addressed to the Administrator, GSA. Agency may wish to hold further questions pertaining to frequent flyer mileage credits in abeyance pending GAO and GSA consideration of request from Senior Executives Association.

B-245486, March 18, 1992

Civilian Personnel

Compensation

- Overtime
- ■ Eligibility
- ■ ■ Travel time

A nonexempt, prevailing rate (wage board) employee who traveled from his headquarters to a temporary duty site during nonduty hours is not entitled to overtime compensation for such period of travel under either 5 U.S.C. § 5544(a) or the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* Upon his return to headquarters, overtime is not payable for his "work to home" travel under title 5 or the FLSA. See 5 C.F.R. §§ 550.112(g) and 551.422 (1991).

B-247499, March 18, 1992

Civilian Personnel

Compensation

- Retirement
- ■ Claim settlement
- ■ ■ GAO authority

Civilian Personnel

Compensation

- Retirement accounts
- ■ Deposit
- ■ ■ Statutes
- ■ ■ ■ Applicability

In response to retired employee's concern with the Office of Personnel Management's (OPM) handling of his election of a survivor annuity for his wife, Senator is advised that jurisdiction for such claims has been delegated to OPM. Also, since retired employee's claim has been dismissed by Merit Systems Protection Board this Office would be precluded from hearing his claim under the doctrine of *resjudicata*. We agree, however, with OPM's determination that the applicable provisions of law and regulations as to annuity require retired employee to make a deposit to cover all periods since retirement in which the survivor reduction was not in effect, plus interest.

B-245614, March 20, 1992***

Civilian Personnel

Relocation

- Residence transaction expenses
 - ■ Application fees
 - ■ ■ Reimbursement
-

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Miscellaneous expenses
- ■ ■ Reimbursement

A transferred employee, who purchased a residence at her new duty station, requests reimbursement of a Mortgage Credit Certificate application fee. The claim was denied by her employing agency as a nonreimbursable finance charge. Although the fee is not a finance charge since it was paid to a third party and was not a prerequisite for financing, the fee may not be reimbursed since it is not identified in the Federal Travel Regulation (FTR) as a reimbursable expense, nor is it similar in nature to other fees and charges listed in the FTR in 41 C.F.R. §§ 302-6.2(d)(i) through (v), nor is it a fee for a "required service" under FTR § 302-6.2(f).

B-246004, March 23, 1992

Civilian Personnel

Relocation

- Expenses
 - ■ Reimbursement
 - ■ ■ Eligibility
 - ■ ■ ■ Manpower shortages
-

Civilian Personnel

Relocation

- Meritorious claims
-

Civilian Personnel

Relocation

- Travel expenses
- ■ Manpower shortages

A manpower shortage category appointee received erroneous advice from agency officials regarding travel and transportation entitlements to first duty station. That erroneous information was reiterated in the employee's travel authorization. Under 5 U.S.C. § 5723 (1988), manpower shortage category appointees have limited entitlements and any expenses incurred in excess of those entitlements may not be reimbursed. However, in view of the amount of expenses incurred by the employee in good faith reliance on the erroneous representations of agency officials, we are submitting the matter to the Congress under 31 U.S.C. § 3702(d) (1988) as a meritorious claim.

B-227234.2, March 25, 1992

Civilian Personnel

Relocation

- Overseas personnel
 - ■ Quarters allowances
 - ■ ■ Eligibility
-

Civilian Personnel

Relocation

- Overseas personnel
- ■ Return travel
- ■ ■ Eligibility

An Air Force member who retired and is locally hired overseas as a civilian employee may receive a living quarters allowance and a return transportation agreement if the employment takes place before his entitlement to government transportation back to the United States based on his military retirement is used or expires. For this purpose, the Department of Defense policy views a retired military member's use of any portion of his entitlement to transportation for himself and dependents as disqualifying. Under applicable regulations, this is not an impermissible policy. Thus, where an individual returned his daughter to the United States incident to his military retirement but before his civilian employment, he was not eligible for the civilian quarters allowance or transportation agreement.

B-246482, March 25, 1992

Civilian Personnel

Travel

- Temporary duty
 - ■ Annual leave
 - ■ ■ Return travel
 - ■ ■ ■ Constructive expenses
-

Civilian Personnel

Travel

- Temporary duty
- ■ Travel expenses
- ■ ■ Additional costs
- ■ ■ ■ Bonuses

An employee's claim for the value of an airline ticket procured with his personal frequent flyer mileage credits for return travel from an annual leave point to his permanent duty station with a stopover at a temporary duty point en route may not be allowed. An employee is obligated to return from annual leave at his own expense. If he chooses to return after completion of a temporary duty assignment en route, he may be reimbursed only for the difference between what it cost him to return via the temporary duty site and what it would have cost him to return to his duty station directly from his annual leave site. Here, the employee incurred no additional transportation expense attributable to the temporary duty assignment.

B-246874, March 27, 1992

Civilian Personnel

Travel

- Temporary quarters
 - ■ Miscellaneous expenses
 - ■ ■ Eligibility
-

Civilian Personnel

Travel

- Temporary duty
- ■ Miscellaneous expenses
- ■ ■ Reimbursement

An employee on temporary duty rented a furnished apartment and incurred a telephone connection charge for which she seeks reimbursement. Such a charge is a non-reimbursable installation charge rather than a reimbursable telephone use fee. Employee's claim is denied.

B-246296, March 30, 1992

Civilian Personnel

Relocation

- Residence transaction expenses
 - ■ Finance charges
-

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Miscellaneous expenses
- ■ ■ Reimbursement

A transferred employee may not be reimbursed for the buyer's closing costs he paid in the sale of his residence in the absence of evidence that such costs were customarily required to be paid by the seller in the locality at that time. Further, travel regulations establish the policy that the government is not responsible for real estate losses or other problems associated with market conditions. Thus, amount claimed by employee-seller for otherwise disallowable closing costs that were paid as an inducement to the purchaser in a "buyer's marker" is not reimbursable.

B-246809, March 31, 1992

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Loan origination fees
- ■ ■ Reimbursement
- ■ ■ ■ Amount determination

Under the Federal Travel Regulations, an employee can be reimbursed for a loan origination fee in excess of one percent of the loan amount only if the lender's administrative charges are itemized and shown by clear and convincing evidence not to include prepaid interest, points, or a mortgage discount. A letter from the lender stating that its two percent loan origination fee is a standard administrative fee charged by the lenders in the area to process the loan and does not include any points, prepaid interest, or discounts is not an itemization of the lender's administrative charges. Thus, the employee may not be reimbursed in excess of one percent of the loan amount.

Military Personnel

B-235924.3, March 9, 1992

Military Personnel

Pay

- Retirement pay
- ■ Amount determination
- ■ ■ Computation
- ■ ■ ■ Effective dates

A retired warrant officer with prior enlisted service who was receiving the pay and allowances of an E-9 under the saved pay provisions of 37 U.S.C. § 907, is entitled under 10 U.S.C. § 1406(b) to have her retired pay computed as an E-9.

B-247744, March 16, 1992

Military Personnel

Pay

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A former Navy member was erroneously overpaid for 42 days lump sum leave upon separation from the service. The member is not entitled to a waiver of the overpayment because he should have been aware of his approximate leave balance and therefore should have questioned the accuracy of the separation payment.

B-247574, March 18, 1992

Military Personnel

Relocation

- Travel expenses
- ■ Vouchers
- ■ ■ Fraud

Claimant submits a fraudulent travel voucher and is paid for travel and transportation expenses for his dependents who did not travel at the time the expenses were claimed in connection with a permanent change of station. Because of this fraud, claimant cannot later reclaim these expenses even when these expenses are actually incurred by his dependents, since the fraudulent submissions are viewed as vitiating any payment arising out of the transaction.

B-244977, March 23, 1992

Military Personnel

Pay

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A discharged service member's request for waiver of his debt arising from advance pay made to him upon his reenlistment may not be considered for waiver under 10 U.S.C. § 2774 since only erroneous payments may be considered under that statute. When payments such as advance pay are legal and valid, they are not erroneous for purposes of the waiver statute and subsequent decision by the member to request discharge does not affect the character of the payment.

B-245112, B-245112.2, March 30, 1992

Military Personnel

Relocation

- Household goods
- ■ Temporary storage
- ■ ■ Additional expenses

A service member who objects to the storing of his household goods in a DOD-approved warehouse at destination until his quarters are ready for occupancy, knowing that they are stored on the vans that transported them, is liable for any additional costs incurred by the government due to the detention of the carrier's vans. The Joint Federal Travel Regulations provide that the member must bear the cost of transportation in excess of the lowest overall cost to the government without special services, and members certify that they will pay for such additional services, like van detention, when they apply for moving entitlements.

Military Personnel

Relocation

- Household goods
- ■ Shipment costs
- ■ ■ Waiver

A service member's debt for additional services provided to him in a permanent change of station move is not an "erroneous payment" that may be considered under the waiver statute (10 U.S.C. § 2774).

Miscellaneous Topics

B-245032, March 9, 1992***

Miscellaneous Topics

Federal Administrative/Legislative Matters

- Administrative regulations
- ■ Grant recipients
- ■ ■ Small businesses
- ■ ■ ■ Profits

The Department of Health and Human Services should follow a Small Business Administration policy directive providing for payment of a profit to grant recipients in the context of a Small Business Innovation Research Program. The Department's regulation prohibiting the payment of profits to for-profit organizations is superseded because the Administration's policy directive is mandated under the Small Business Innovation Development Act of 1982 and the provision of profits is a proper exercise of discretion by the agency charged by Congress to oversee the program.

B-245708, March 11, 1992

Miscellaneous Topics

Federal Administrative/Legislative Matters

- Administrative regulations
- ■ Travel
- ■ ■ Bonuses
- ■ ■ ■ Gifts/donations

The Acting Chief Financial Officer, Department of Energy, is advised, in response to a request to donate frequent flyer mileage credits to a charitable organization such as the "Miles for Kids in Need" program, that the disposal of personal property is within the jurisdiction of the Administrator, General Services Administration (GSA), and that GSA regulations exist for such disposal in 41 C.F.R. § 101-25.103.4 (1991). Issue remains as to whether such credits become surplus since there is always potential for their use up to the date of expiration. Specific questions concerning specific charities should be addressed to the Administrator, GSA. Agency may wish to hold further questions pertaining to frequent flyer mileage credits in abeyance pending GAO and GSA consideration of request from Senior Executives Association.

Procurement

B-242845.4, March 2, 1992

92-1 CPD 245

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Third low offeror protesting the award of a contract on the basis that the joint venture awardee is not a small disadvantaged business is not an interested party under the Bid Protest Regulations to protest the award, since the protester would not be next in line for the award if the protest were upheld.

B-243544.3, March 2, 1992

92-1 CPD 246

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

General Accounting Office will not consider, upon request for reconsideration, new arguments and information that the protester could have raised during the original protest.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision is denied where the protester essentially only restates its initial arguments and expresses disagreement with the decision.

B-246170.2, March 2, 1992

92-1 CPD 247

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Procurement

Competitive Negotiation

- Offers
- ■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where the agency reopened discussions and requested another round of best and final offers approximately 5 weeks after the protest was filed, which was approximately 1 week after it ascertained that inappropri-

ate discussions may have been conducted with the awardee, but such action was not taken in response to a protested violation of a statute or regulation.

B-246315, March 2, 1992

92-1 CPD 248

Procurement

Competitive Negotiation

- Contract awards
- ■ Initial-offer awards
- ■ ■ Propriety

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Contracting agency improperly awarded a contract on the basis of initial proposals where low offeror failed to establish that its proposed telephone system conformed to all solicitation requirements.

Procurement

Competitive Negotiation

- Contract awards
- ■ Propriety
- ■ ■ Post-award discussion

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Propriety

Where agency accepts proposal that does not show compliance with specifications, and then conducts post-award discussions with awardee to permit substitution of conforming equipment for originally proposed nonconforming equipment, discussions must be held with all competitive range offerors.

B-246339, March 2, 1992

92-1 CPD 249

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Facsimile

Contracting agency properly rejected bid as nonresponsive where bidder acknowledged a material amendment by facsimile transmission, which was not permitted by the solicitation. Although contract specialist orally advised bidder that facsimile acknowledgment would be acceptable, a bidder may not rely on oral advice which is inconsistent with a solicitation.

Procurement

Sealed Bidding

- Bids
 - ■ Evaluation
 - ■ ■ Price adjustments
 - ■ ■ ■ Prompt payment discounts
-

Procurement

Sealed Bidding

- Invitations for bids
- ■ Terms
- ■ ■ Price adjustments

When evaluating bids under an IFB, the Government Printing Office may reduce a bidder's prices through adjustments intended to reflect prompt payment discounts offered by that bidder (even though this adjustment displaces another bidder's seemingly lower bid) because provisions incorporated by reference into the IFB provide for such adjustments.

Procurement

Competitive Negotiation

- Contract awards
- ■ Initial-offer awards
- ■ ■ Discussion
- ■ ■ ■ Propriety

In a negotiated procurement by a civilian agency, award on the basis of initial proposals without discussions was improper where the low priced protester was clearly acceptable but for an informational deficiency that was easily correctable through discussions and thus award on initial proposals may not result in the lowest overall cost to the government.

Procurement

Sealed Bidding

- Invitations for bids
 - ■ Cancellation
 - ■ ■ Justification
 - ■ ■ ■ Minimum needs standards
-

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Use
- ■ ■ Propriety

Agency's determination to cancel sealed bid procurement and to acquire equipment listed on a mandatory Federal Supply Schedule is not improper where agency reasonably determines that listed equipment meets its needs.

Procurement

Competitive Negotiation

- Alternate offers
 - ■ Rejection
 - ■ ■ Propriety
-

Procurement

Competitive Negotiation

- Offers
- ■ Technical acceptability
- ■ ■ Descriptive literature

Agency evaluation finding protester's offered alternate product technically unacceptable was reasonable where the protester failed to submit sufficient information demonstrating that its alternate product was the technical equivalent of the approved product listed in the request for proposals.

Procurement

Sealed Bidding

- Invitations for bids
 - ■ Amendments
 - ■ ■ Notification
-

Procurement

Sealed Bidding

- Invitations for bids
- ■ Competition rights
- ■ ■ Contractors
- ■ ■ ■ Exclusion

Prospective bidder's failure to receive a solicitation amendment does not warrant a resolicitation where there is no showing that the cause of the failure was the result of a deliberate attempt by the contracting agency to exclude the bidder or the result of deficiencies in the contracting agency's solicitation dissemination process.

Procurement

Bid Protests

- Definition

Allegation that an awardee submitted an unreasonably low price does not form a valid basis of protest.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Letters of credit
- ■ ■ ■ Adequacy

Agency properly rejected protester's bid as nonresponsive where bid guarantee, in the form of an irrevocable letter of credit, was unacceptable because it incorporated provision of Uniform Customs and Practice for Documentary Credits which renders the liability of the issuing bank uncertain in the event of certain interruptions in the bank's business.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Amount determination

General Accounting Office declines to adopt a mandatory ceiling on allowable protest costs based upon the dollar value of the acquisition; there exists no necessary correlation between the dollar value of an acquisition and the complexity of the issues involved in a bid protest, and such a ceiling would be inconsistent with the congressional aim of facilitating the enforcement of the procurement statutes.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Protest costs incurred in connection with agency-level protest are unallowable, as such costs are unrelated to protester's filing and pursuit of its protest before General Accounting Office.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Amount determination

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

In considering claim for protest costs, General Accounting Office will examine the reasonableness of the claimed number of hours spent by attorneys for the protester where agency identifies specific hours as excessive and articulates reasoned analysis as to why hours are excessive; the hours determined to be excessive will not be allowed.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Reimbursement of protest costs will be based upon the customary hourly rate charged by counsel performing similar work in counsel's community; the fact that protester's counsel charges less than counsel in other communities is irrelevant and does not form a basis to reimburse protester for hours which are otherwise determined to be excessive and therefore unallowable.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Burden of proof

Where record does not reflect that protest-related work was performed during hours of travel, protester seeking reimbursement for protest costs may not be reimbursed at counsel's full, customary hourly rate for time spent in travel.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Amount determination

Where successful protester claims in-house personnel costs which the agency argues are attributable, at least in part, to agency-level protest proceedings, and protester does not rebut allegation, entire amount, other than the time attributable to actual participation in protest conference at the General Accounting Office, will be disallowed from claim for protest costs even though a portion may properly be reimbursed.

B-242201.3, March 4, 1992

92-1 CPD 258

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Contention that agency improperly required protester during discussions to change its proposed method of operation and increase manning levels for certain positions related to a food services contract, causing the protester to increase its proposed cost, is denied, where the record shows that the agency properly pointed out during discussions staffing deficiencies in the protester's proposal; any resulting increase in the protester's cost was necessary to cover the cost of manning the required positions to meet the agency's stated needs.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Discussion**

In a procurement for the acquisition of lightning data, agency properly excluded protester from competitive range where it reasonably determined that pricing and technical deficiencies in protester's initial alternate proposals, which had been pointed out in discussions, had not been eliminated in protester's revised proposal.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Administrative discretion**

Where agency had reasonable basis for concluding that protester had no chance for award, exclusion of protester from further consideration was proper, notwithstanding that as a consequence only one firm remained in competitive range.

Procurement

Competitive Negotiation**■ Discussion****■ ■ Adequacy****■ ■ ■ Price negotiation**

Discussions concerning price were meaningful, and thus unobjectionable, where, after evaluation of initial alternate proposals, agency advised protester that its prices exceeded the government estimate and provided it an opportunity to submit revised proposals. There is no merit to protester's allegation that agency also was required to disclose protester's relative price standing, which agencies generally are prohibited from disclosing during discussions.

Procurement

Contractor Qualification**■ Responsibility****■ ■ Contracting officer findings****■ ■ ■ Negative determination****■ ■ ■ ■ Pre-award surveys**

Protest against contracting officer's negative responsibility determination is denied where the determination was based on the protester's failure of a preaward test, and the record contains documentation that provides a reasonable basis for the negative test results and the resultant contracting officer's determination.

Procurement

Sealed Bidding

- Bids
 - ■ Responsiveness
 - ■ ■ Certification
 - ■ ■ ■ Signatures
-

Procurement

Sealed Bidding

- Terms
- ■ Materiality
- ■ ■ Integrity certification

Where bidder's representative failed to sign required Certificate of Procurement Integrity on designated signature line, bidder is not unequivocally committed to certificate's terms and bid must be rejected as nonresponsive.

Procurement

Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Design specifications
- ■ ■ ■ Justification

Protest that specifications for lawn sprinklers are unduly restrictive is denied where record shows that agency reasonably determined that features specified were necessary to satisfy the agency's minimum needs for stability, mobility, durability and performance, and the specifications permit increased competition.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency reasonably rejected as technically unacceptable proposal for instructional services where the proposed instructor received poor performance ratings for past courses taught, and the proposal failed to provide evidence of the instructor's current knowledge of subject matter, as required by the solicitation.

Procurement

Small Purchase Method

- Requests for quotations
- ■ Contractors
- ■ ■ Exclusion
- ■ ■ ■ Propriety

Protest by incumbent against agency's failure to solicit firm is denied where agency, using small purchase procedures, obtained adequate competition and record does not show that award was made at unreasonable price or that agency acted deliberately to exclude protester.

Procurement

Sealed Bidding

- Bids
- ■ Late submission
- ■ ■ Acceptance criteria
- ■ ■ ■ Government mishandling

Where the agency has discarded the bid envelope upon receipt of a late bid delivered by Express Mail, but the record clearly establishes that the bid was sent 2 working days prior to bid opening as required by FAR § 14.304-1 (a)(3), the bid may be considered.

Procurement

Sealed Bidding

- Bids
- ■ Late submission
- ■ ■ Acceptance criteria
- ■ ■ ■ Government mishandling

Where bid is late due to government mishandling—agency's failure to ensure the timely transmission of bid from activity's mailroom to bid opening site—bid should properly have been accepted.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Amendments
- ■ ■ Propriety

The agency had the required compelling reason to request a second round of best and final offers (BAFO) where the record shows that the agency had a need to incorporate into the solicitation design changes which resulted from the failure of a prototype of the item solicited in testing after the submission of initial BAFOs.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Price disclosure
- ■ ■ Allegation substantiation

Protester's assertion that its price position may have been disclosed to its competitor and that the government engaged in a prohibited auction is denied where there is no evidence of any improper governmental action, and the disclosure, if any, was made by a nongovernmental source.

B-246413; B-246413.2, March 9, 1992

92-1 CPD 267

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Affirmative determination
- ■ ■ ■ GAO review

Procurement

Contractor Qualification

- Responsibility criteria
- ■ Distinctions
- ■ ■ Evaluation criteria

Protest that certain solicitation provisions under a competitive section 8(a) procurement were either technical evaluation criteria or definitive responsibility criteria, and that the procuring agency failed to consider these provisions in evaluating the awardee's proposal and responsibility are denied, where the provisions were general responsibility factors that the procuring agency could consider in making an affirmative determination of the awardee's responsibility.

Procurement

Competitive Negotiation

- Offers
- ■ Clerical errors
- ■ ■ Error correction
- ■ ■ ■ Propriety

Procuring agency properly allowed correction of the awardee's low priced total offer without opening discussions to correct a unit price for indefinite quantity work that contained an obvious error, in that it stated a monthly rate rather than the requested hourly rate, and the corrected unit price was the only reasonable interpretation of the offer and was ascertainable from the face of the offer, since the extended price for the item was correct and the estimated quantity of hours was stated in the solicitation.

Procurement

Special Procurement Methods/Categories

- Computer equipment/services
 - ■ Alternate offers
 - ■ ■ Rejection
 - ■ ■ ■ Propriety
-

Procurement

Special Procurement Methods/Categories

- Computer equipment/services
- ■ Offers
- ■ ■ Evaluation
- ■ ■ ■ Technical acceptability

Agency properly rejected protester's automatic data processing equipment as unacceptable where it reasonably determined that the proposed equipment did not possess all of the features specified, and thus was not equivalent to that described in the *Commerce Business Daily* announcement.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Research/development contracts
- ■ ■ Offers
- ■ ■ ■ Evaluation

Protest against agency decision to reject proposal submitted under Small Business Innovation Research Program is denied where record shows that evaluation was reasonable and that agency complied with applicable regulations and solicitation provisions.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that agency deprived protester of an opportunity to compete because it failed to furnish a copy of the solicitation is dismissed as untimely where procurement was synopsisized in the *Commerce Business Daily*, and the protester did not file a protest with either the contracting agency or with the General Accounting Office within 10 working days of the closing time specified in the synopsis.

Procurement

Bid Protests

- GAO procedures
 - ■ Protest timeliness
 - ■ ■ Good cause exemptions
 - ■ ■ ■ Applicability
-

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Significant issue exemptions
- ■ ■ ■ Applicability

Protest against solicitation provision is dismissed as untimely where filed after the time for receipt of initial proposals; circumstances do not indicate that failure to file timely protest arose from good cause or that protest against award factors in the solicitation constitutes significant issue, such that General Accounting Office will consider the protest despite its untimeliness.

B-244649.2, March 10, 1992

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where the protester has not shown that our prior decision contains either errors of fact or law, and the protester merely disagrees with our prior decision.

B-244952.2, March 10, 1992

92-1 CPD 271

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Protester is not entitled to the costs of filing and pursuing its protest where, in response to protest which challenged a specification, the agency proposed to modify the specification within 3 weeks of the protest being filed, and where upon consideration of continuing objections expressed by the protester, the agency then presented a draft amendment to the specification, acceptable to the protester, with its timely agency report filed 2 weeks later.

Procurement

Small Purchase Method

- Quotations
- ■ Evaluation errors
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Procurement

Small Purchase Method

- Requests for quotations
- ■ Evaluation criteria
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Weighting

Where solicitation does not reasonably communicate extremely heavy weight to be assigned design and installation in determining most advantageous offer, and in fact this weighting is not consistent with reasonable reading of solicitation evaluation method, protest against agency's use of its evaluation scheme is sustained.

Procurement

Competitive Negotiation

- Contract awards
- ■ Propriety
- ■ ■ Corporate entities

Procurement

Contractor Qualification

- Organizational conflicts of interest
- ■ Corporate ownership

Agency reasonably determined that firm was substantially controlled by a government employee, and therefore ineligible for contract award, where government employee represented the firm in prework conferences under prior contracts with the agency, served as the contact for any complaints about contract performance and, based on his involvement with the firm, was disciplined for violating his employing agency's conflict of interest regulations.

Procurement

Contractor Qualification

- Organizational conflicts of interest
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Procurement

Contractor Qualification

- Organizational conflicts of interest
- ■ Corporate ownership

Agency was not required to establish the existence of an actual conflict of interest to preclude an offeror from competing, where it had a reasonable, factual basis for concluding there was a likelihood an actual conflict existed.

Procurement

Sealed Bidding**■ Bids****■ ■ Responsiveness****■ ■ ■ Additional work/quantities****■ ■ ■ ■ Price omission**

Bid that acknowledges all amendments to a solicitation, but contains a previous version of the bid schedule, which was modified by a later amendment to increase the quantity of an option item, is nonresponsive where the bid offers a unit and total price for the original lesser quantity but fails to include a price for the increased quantity, since the bid does not represent a clear commitment to furnish the increased quantity at a specified price.

Procurement

Bid Protests**■ GAO procedures****■ ■ GAO decisions****■ ■ ■ Reconsideration**

Request for reconsideration of prior dismissal for untimeliness is denied where protester does not show that prior decision contains errors of fact or law or information not previously considered that warrants reversal of our decision.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation errors****■ ■ ■ Evaluation criteria****■ ■ ■ ■ Application**

Protest that an agency improperly evaluated protester's proposal is denied where record shows that the agency's evaluation of the proposal was reasonable and in accordance with the solicitation's evaluation criteria.

Procurement

Bid Protests**■ GAO procedures****■ ■ Interested parties****■ ■ ■ Direct interest standards**

Protester does not have the direct economic interest to be considered an interested party to protest the reasonableness of the cost-technical tradeoff decision where the protester would not be next in line for award—based on its evaluation score—if the protest were sustained.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Compliance

Agency properly concluded that awardee's bid was responsive, where the bid complied with the only reasonable interpretation of a technical specification in the solicitation, which the protester erroneously assumed should be interpreted differently.

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

Offer was properly excluded from the competitive range where the procuring agency reasonably concluded that the offeror had no reasonable chance of award because the offeror's proposal did not include necessary information to demonstrate that the offeror could perform the contract for real estate management services.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Ambiguous specifications

Contracting agency had a compelling reason to cancel invitation for bids (IFB) after bid opening where it reasonably determined as a result of a pre-award survey that IFB requirements related to minimum manning level for transient aircraft services were ambiguous.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Price omission
- ■ ■ ■ Line items

Agency properly rejected as nonresponsive a bid for air conditioners which did not include prices for packaging where solicitation required packaging prices and packaging was a material solicitation requirement.

Procurement

Sealed Bidding

■ Bids

■ ■ Errors

■ ■ ■ Waiver

Agency's decision not to waive protester's price omission for packaging was reasonable where packaging was a material solicitation requirement and was not divisible from the other requirements of the solicitation.

B-245895.3, March 13, 1992

92-1 CPD 281

Procurement

Bid Protests

■ GAO procedures

■ ■ Interested parties

■ ■ ■ Direct interest standards

Third ranked offeror protesting the award of a contract on the basis that the joint venture award-ee is not a small disadvantaged business is not an interested party under Bid Protest Regulations to protest the award, since the protester would not be next in line for the award if the protest were upheld.

B-246207.2, B-246207.3, March 13, 1992

92-1 CPD 282

Procurement

Sealed Bidding

■ Invitations for bids

■ ■ Post-bid opening cancellation

■ ■ ■ Justification

■ ■ ■ ■ Sufficiency

Agency's failure to correct defective specification in response to protester's pre-bid opening clarification request does not provide basis for challenging cancellation of that portion of the solicitation where protester concedes that specification is defective and misled protester to supply a transformer type which will not serve agency's actual needs.

Procurement

Bid Protests

■ GAO procedures

■ ■ Interested parties

■ ■ ■ Direct interest standards

Protest that contracting agency improperly canceled remaining portion of solicitation is dismissed where record shows that even if protest were sustained, protester would not be in line for award.

Procurement

Competitive Negotiation

- Best/final offers
 - ■ Rejection
 - ■ ■ Ambiguous offers
-

Procurement

Competitive Negotiation

- Best/final offers
- ■ Technical acceptability
- ■ ■ Negative determination
- ■ ■ ■ Propriety

Agency properly rejected protester's best and final offer (BAFO) as technically unacceptable, where the protester furnished a revised equipment list with its BAFO that facially was all inclusive but did not include two mandatory pieces of equipment; the protester, at the very least, created an ambiguity as to whether it was offering this equipment.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Bid guarantees
- ■ ■ ■ Omission

Bid which did not include bid bond was properly rejected despite bidder's assertion, supported by employee's affidavit, that bond was included with its bid package submitted to agency prior to bid opening. In absence of independent evidence to establish validity of bidder's assertion, bid may not be considered responsive.

Procurement

Contractor Qualification

- Approved sources
 - ■ Alternate sources
 - ■ ■ Approval
 - ■ ■ ■ Government delays
-

Procurement

Small Purchase Method

- Competition
- ■ Use
- ■ ■ Criteria

Where agency determines that an item should be procured under small purchase procedures on a sole-source basis but provides for other offerors to supply pertinent information to demonstrate ability to provide required item, agency's failure to evaluate and determine the acceptability of protester's alternate item in a timely manner denies protester a reasonable opportunity to qualify as a source and to compete for award and violates the requirement under the small purchase procedures to obtain competition to the maximum extent practicable.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation errors****■ ■ ■ Evaluation criteria****■ ■ ■ ■ Application**

Protest that agency improperly evaluated proposal for the lease of a building is denied where record shows that the agency evaluation was reasonable and consistent with the solicitation's evaluation criteria.

Procurement

Bid Protests**■ Bias allegation****■ ■ Allegation substantiation****■ ■ ■ Burden of proof**

Contention that agency was biased and determined in advance not to award a lease for the protesters' building under any circumstances is denied where: (1) the protester fails to establish that the contracting officer acknowledged in a private meeting that the agency was biased against the protester or its building; and (2) despite the dissatisfaction of the tenant agency with its existing unrenovated space, the record, on balance, shows that the agency was attempting to ensure that the procurement was conducted in compliance with statutory requirements for full and open competition.

B-247442, March 16, 1992

Procurement

Payment/Discharge**■ Shipment****■ ■ Carrier liability****■ ■ ■ Burden of proof**

Proof of tender of shotgun is not established merely by GBL statement that "shipment contains firearms" where shipper, who was counseled that firearm shipments require special attention, signs inventory that does not mention the firearm and asserts that it was contained in an inventoried carton labeled "Wardrobe stuffed animals."

Procurement

Payment/Discharge**■ Shipment****■ ■ Carrier liability****■ ■ ■ Burden of proof**

Prima facie case of carrier liability is established where items allegedly lost bear a reasonable relationship to items shown on the inventory as a carton's contents. The carrier packed the shipment and was responsible for preparing the inventory, and it is not reasonable to conclude simply from the carrier's own labeling and inventorying decisions that items not specified on the inventory and claimed lost were not tendered.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration
- ■ ■ ■ Additional information

The General Accounting Office will not consider new arguments raised by the agency in request for reconsideration where those arguments are derived from information available during initial consideration of protest but not argued, or from information available but not submitted during initial protest, since parties withhold or fail to submit relevant evidence, information, or analysis for our initial consideration at their own peril.

Procurement

Bid Protests

- Premature allegation
- ■ GAO review

Procurement

Contractor Qualification

- Organizational conflicts of interest
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Contracting agency's argument, in request for reconsideration of prior decision sustaining a protest against the noncompetitive award of a follow-on contract, that the protester—a potential offeror under a competitive request for proposals—is not an interested party under the General Accounting Office's Bid Protest Regulations because the protester has an organizational conflict of interest that would render the protester ineligible for award under a competitive solicitation, is not supported by the record, where agency has not received and evaluated a proposal from the protester; has made no determination regarding the status or eligibility of the protester to receive award based upon information submitted in response to a competitive solicitation; and where the agency implies it has no information to substantiate its contention.

Procurement

Bid Protests

- GAO decisions
- ■ Recommendations
- ■ ■ Modification

Prior decision sustaining protest against the proposed award of a sole-source, follow-on contract and recommending that agency satisfy its requirement through a competitive procurement is modified to delete the recommendation in light of new information provided by the agency showing that competing the procurement is not now practicable.

Procurement

Competitive Negotiation

- Alternate offers
 - ■ Rejection
 - ■ ■ Propriety
-

Procurement

Specifications

- Minimum needs standards
- ■ Determination
- ■ ■ Administrative discretion

Protest of agency's determination that only one ablative coating would meet its needs is denied, where agency evaluated protester's offered alternate item and had a reasonable basis for finding that protester's product was unacceptable.

Procurement

Contractor Qualification

- Approved sources
- ■ Alternate sources
- ■ ■ Approval

Agency was not required to consider a new product as an alternate item where, although it was being evaluated by agency technical personnel, it had not yet been approved as an acceptable alternate item.

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Affirmative determination
- ■ ■ ■ GAO review

Whether a contractor is capable of complying with a commercial product requirement in the specification involves the agency's affirmative determination of the awardee's responsibility, which generally is not reviewable by the General Accounting Office.

Procurement

Sealed Bidding

- Competitive advantage
- ■ Conflicts of interest
- ■ ■ Allegation substantiation
- ■ ■ ■ Lacking

Awardee that hired a former government employee did not have an unfair competitive advantage in procurement for drill rig where it is speculative whether former employee even reviewed protester's proprietary information and where employee did not assist awardee in preparing its bid other than to obtain supplier quotations for minor items.

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ 10-day rule

Protest the awardee's offered equipment does not comply with requirements of invitation for bids is dismissed as untimely when filed more than 10 working days after the protester received the agency report from which it learned this basis of protest.

B-246719, March 18, 1992

92-1 CPD 291

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Terms

■ ■ ■ Foreign currencies

Procurement

Special Procurement Methods/Categories

■ Service contracts

■ ■ Terms

Protest that solicitation for embassy guard services requiring offers to be submitted in local currency violates 22 U.S.C. § 4864(c)(2) (Supp. II 1990) is denied where this section requires the Department of State (DOS) to establish procedures to ensure that appropriate measures are taken to assure that United States persons are not disadvantaged during the solicitation and bid evaluation process due to their distance from the post.

B-247074, March 18, 1992

92-1 CPD 290

Procurement

Small Purchase Method

■ Quotations

■ ■ Late submission

■ ■ ■ Acceptance criteria

■ ■ ■ ■ Government mishandling

Protest challenging the issuance of a purchase order to a firm other than the protester under a request for quotations issued using small purchase procedures is denied where the apparent agency loss of protester's quotation was an act of occasional negligence and not a breach of agency's duty to promote competition to the maximum extent practicable when using small purchase procedures.

B-247909, March 18, 1992

92-1 CPD 292

Procurement

Bid Protests

■ GAO procedures

■ ■ Purposes

■ ■ ■ Competition enhancement

General Accounting Office (GAO) will not entertain protest allegation that specifications should be more restrictive, since GAO's role is to ensure that full and open competition requirements are met, not to protect any interest a protester may have in more restrictive specifications.

Procurement**Sealed Bidding**

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Minimum needs standards

Compelling reason exists to cancel an invitation for bids after bid opening where the agency determines that the specifications on which the competition was based overstate the government's minimum needs.

Procurement**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Award to higher rated, higher price offeror was proper under solicitation in which price was less important than technical factors and agency reasonably concluded that the technical advantages associated with the awardee's proposal outweighed the higher price.

Procurement**Contractor Qualification**

- Licenses
- ■ State/local laws
- ■ ■ Compliance

Procurement**Socio-Economic Policies**

- Small businesses
- ■ Responsibility
- ■ ■ Negative determination
- ■ ■ ■ Effects

Protest concerning rejection of quotation for lack of a valid state contractor license is sustained since the rejection was, in fact, a determination that a small business offeror was nonresponsible—a matter which was required to be referred to the Small Business Administration for certificate of competency review but was not.

Procurement**Socio-Economic Policies**

- Small business 8(a) subcontracting
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Small business set-asides

Where procurement was initially synopsisized in the *Commerce Business Daily* as a small business set-aside, and subsequently accepted into the Small Business Administration's (SBA) Section 8(a)

program only because SBA incorrectly understood the relevant facts, withdrawing the procurement from the 8(a) program and reconverting it to a small business set-aside, once SBA had been apprised of the actual situation, was proper.

B-246731, March 19, 1992

92-1 CPD 297

Procurement

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Award to a higher-priced offeror is unobjectionable under a request for proposals that stated that technical considerations were more important than cost and agency reasonably found higher-priced proposal to be technically superior compared with protester's lower-priced, lower-scored technical proposal and reasonably concluded that the protester's price advantage over the award-ee's was outweighed by the protester's evaluated higher risk.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest that the government should not evaluate "best commercial practices" for overhauling engines—the stated objective of the solicitation—is untimely filed and will not be considered where the evaluation areas and elements within each area were announced in the solicitation and protest was not filed until after the closing date receipt of proposals.

B-245130.2, March 20, 1992

92-1 CPD 298

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Protester is not entitled to the costs of filing and pursuing its protest where the contracting officer issued a formal amendment deleting the challenged delivery limitation provision in the solicitation on the day the agency report on the protest was to be filed with our Office, and record does not establish undue delay in taking corrective action.

B-246604, B-246604.3, March 20, 1992

92-1 CPD 299

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Price negotiation

Agency did not employ improper auction techniques in the course of a negotiated procurement when, during discussions, it advised the protester of areas in its proposal where the agency perceived the potential for cost overruns and advised the protester that a failure to either justify its cost proposal as initially submitted or to revise it accordingly could affect the protester's chances for award.

Procurement

Bid Protests

- GAO procedures
 - ■ GAO decisions
 - ■ ■ Reversal
 - ■ ■ ■ Factual errors
-

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Alleged inaccuracies in the labor-mix included in a solicitation must be protested prior to the time for receipt of initial proposals; allegation that the protester was compelled during discussions to adopt such estimates is not supported where protester's own account of discussions shows that discussions were proper.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Where contracting agency determines that three offers in the final competitive range are technically equal and awards the contract to the low offeror on the basis of price, protester whose offer is third low is not an interested party to challenge the award where it has not challenged the technical equality of the intervening, second low offeror.

B-246758, March 20, 1992

92-1 CPD 300

Procurement

Sealed Bidding

- Invitations for bids
 - ■ Government estimates
 - ■ ■ Defects
 - ■ ■ ■ Allegation substantiation
-

Procurement

Special Procurement Methods/Categories

- Requirements contracts
- ■ Additional work/quantities
- ■ ■ Estimates

A solicitation's workload estimates for laundry services under a requirements contract need not be absolutely correct, but must be reasonably accurate representations of anticipated actual needs. The General Accounting Office will not sustain a challenge to the estimates unless they are not based upon the best information available or are otherwise defective.

B-246852, March 20, 1992

Procurement

Payment/Discharge

- Shipment
- ■ Damages
- ■ ■ Evidence sufficiency

Fact that shipper moved his household goods after delivery by the carrier is not sufficient to prove that properly reported damage actually occurred after delivery.

Procurement

Payment/Discharge

- Shipment
- ■ Carrier liability
- ■ ■ Burden of proof

A general denial by the carrier's driver that there was no damage to the shipper's household goods at time the driver delivered them does not rebut the presumption that the damage was due to the carrier's negligence.

B-245312.2, March 23, 1992

92-1 CPD 301

Procurement

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Although record supports protester's argument that agency increased protester's proposed G&A rate despite a proposed cap on that rate, agency's cost/technical trade-off based on the resulting increased cost remains valid where the cost increase was relatively small and, in any case, clearly had no impact on the award decision, which was largely based on the awardee's significant technical superiority.

B-246605, March 23, 1992

92-1 CPD 302

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Sole-source procurement is proper where record demonstrates that agency had a reasonable basis for concluding that proposed sole-source awardee was the only responsible source capable of completing a study which is a continuation of the awardee's previous contract effort.

Procurement

Bid Protests

- GAO decisions
- ■ Recommendations
- ■ ■ Modification

Agency was not required under modified General Accounting Office recommendation to recompute software requirement satisfied during base year of improperly awarded contract.

Procurement

Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Intellectual property

Where agency acquires only limited technical data rights in software necessary for contract performance, agency may properly require offerors to obtain license from software vendor; fact that licensing requirement may limit competition does not render solicitation unduly restrictive, since software is reasonably related to agency's minimum needs.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Wage rates
- ■ ■ Amendments
- ■ ■ ■ Acknowledgment

Procurement

Socio-Economic Policies

- Labor standards
- ■ Wage rates
- ■ ■ Modification
- ■ ■ ■ Effects

Contracting agency properly rejected as nonresponsive a bid that failed to acknowledge an amendment that contained a modification to the applicable wage determination, which increased wage rates, where there is no evidence that the bidder was legally required to pay its employees wages not less than those prescribed by the Secretary of Labor.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Decision which found contingent fee agreement between selling agency and contractor did not violate contingent fee prohibition set forth at 10 U.S.C. § 2306(b) (1988) is affirmed on reconsideration, where correction of factual error in the decision did not change the ultimate conclusion that the selling agency agreement was proper.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Protester is not entitled to the costs of filing and pursuing its protest where, in response to protest challenging equipment specifications, agency promptly initiated an investigation, discovered that specifications were obsolete, and canceled solicitation 4 days after the agency report on the protest was due to be filed.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

General Accounting Office Bid Protest Regulations do not provide for award of bid preparation cost in cases where agency has taken corrective action.

Procurement

Contract Management

- Contract administration
- ■ Options
- ■ ■ Use
- ■ ■ ■ GAO review

Protest alleging that agency improperly exercised option for a third year of performance of contract involving warehouse space is sustained where record shows that agency's requirements for warehouse space and market price of space have changed substantially since contract was first awarded, and agency did not conduct market survey or test the market with a new solicitation to determine whether exercise of option was the most advantageous method of meeting its needs.

Procurement

Competitive Negotiation

- Offers
- ■ Personnel experience
- ■ ■ Contractor misrepresentation
- ■ ■ ■ Intent

Protest is sustained where awardee could not reasonably expect that two of its proposed key personnel would be available for contract performance at the time it submitted its best and final offer.

Procurement

Competitive Negotiation

- **Technical transfusion/leveling**
- ■ **Allegation substantiation**
- ■ ■ **Evidence sufficiency**

Protest alleging that agency engaged in technical leveling is denied where record does not show that agency helped awardee bring its proposal up to the level of the protester's by pointing out weaknesses in awardee's proposal during successive rounds of discussions.

Procurement

Competitive Negotiation

- **Technical transfusion/leveling**
- ■ **Determination criteria**

Technical leveling does not occur where agency requests clarification about offeror's experience or the qualifications of proposed personnel, even if such requests are made through successive rounds of discussions.

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation errors**
- ■ ■ **Evaluation criteria**
- ■ ■ ■ **Application**

General Accounting Office review of an agency's technical evaluation is limited to ensuring that the evaluation is reasonable and consistent with the evaluation criteria; mere disagreement with the agency does not itself render the evaluation unreasonable.

B-245886.4, March 27, 1992

92-1 CPD 309

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation**
- ■ ■ **Personnel**
- ■ ■ ■ **Adequacy**

Where proposals are to be evaluated based upon the qualifications of proposed personnel, an offeror has the responsibility to propose individuals who may reasonably be expected to be available for performance.

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation**
- ■ ■ **Personnel**
- ■ ■ ■ **Availability**

Where BAFOs are submitted several months after initial proposals and the offeror makes no attempt prior to submitting its best and final offer to determine whether its proposed personnel are available, the offeror has not met that responsibility.

Procurement

Bid Protests

- **Federal procurement regulations/laws**
- ■ **Applicability**
- ■ ■ **GAO authority**

The General Accounting Office has jurisdiction to decide a protest concerning the acquisition of a building site by the General Services Administration under the authority of the Public Buildings Act, 40 U.S.C. § 604 (1988).

Procurement

Special Procurement Methods/Categories

- **Construction contracts**
- ■ **Federal procurement regulations/laws**
- ■ ■ **Applicability**
- ■ ■ ■ **Site acquisition**

The competition requirements of the Federal Property and Administrative Services Act and the Federal Acquisition Regulation are not applicable to the procurement of a building site by the General Services Administration under the authority of the Public Buildings Act, 40 U.S.C. § 604 (1988).

Procurement

Special Procurement Methods/Categories

- **Construction contracts**
- ■ **Contract awards**
- ■ ■ **Propriety**

Procurement

Special Procurement Methods/Categories

- **Offers**
- ■ **Evaluation errors**
- ■ ■ **Evaluation criteria**
- ■ ■ ■ **Application**

A site selection and award by the General Services Administration of a building site is unobjectionable where the agency reasonably evaluated the awardee's proposed site as superior to the protester's proposed site for a number of reasons, each consistent with the site selection criteria provided to the offerors.

Procurement

Sealed Bidding

- **Bids**
- ■ **Late submission**
- ■ ■ **Acceptance criteria**
- ■ ■ ■ **Government mishandling**

Protester's hand-carried bid which was delivered to the mailing address, rather than the address for hand-carried bids, was properly rejected as late where there is no evidence of government mishandling after receipt.

Procurement

Socio-Economic Policies

- Small business set-asides
- ■ Applicability
- ■ ■ Federal supply schedule
- ■ ■ ■ Multiple/aggregate awards

The Small Business set-aside program applies to multiple-award Federal Supply Schedule contracting.

Procurement

Socio-Economic Policies

- Small business set-asides
- ■ Use
- ■ ■ Procedural defects

Protest is sustained where agency decision not to set aside for small business concerns any or all of the three categories of services and products covered by a multiple-award Federal Supply Schedule solicitation did not include the determination, required by the "rule of two," that offers were not expected from at least two small businesses.

Procurement

Sealed Bidding

- Bids
- ■ Late submission
- ■ ■ Acceptance criteria
- ■ ■ ■ Government mishandling

Where procuring agency did not realize that protester's Federal Express envelope, which was not marked as to its contents, contained two bids, and agency returned envelope unopened to bidder because of action taken with respect to the other procurement for which one of the enclosed bids had been submitted, although opening the envelope to verify the contents would have been prudent, the bid may not be considered because the protester bears the primary responsibility for the results since it failed to properly identify the outer envelope as containing bids, and the envelope has been opened by the bidder and there is now no way to verify the original contents.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Compliance

Bid which constitutes an unequivocal offer in accordance with terms of invitation for bids to perform and (IFB) does not take any exception to the IFB material terms was properly considered responsive.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that an agency's solicitation for offers is unduly restrictive is dismissed where the protester misaddresses its protest letter by using the wrong zip code and the protest arrives nearly 2 weeks after the agency receives initial proposals.

Procurement

Payment/Discharge

- Shipment costs
- ■ Rate schedules
- ■ ■ Applicability

Rates and charges issued under a particular tender of service cannot be applied to a Government Bill of Lading (GBL) transaction where the tender of service required the participating agency requesting service under the tender to issue a GBL containing a statement that the services are to be performed in accordance with the rates, rules and provisions of the tender, and where the participating agency failed to prepare a GBL accordingly or failed to substantially comply with the requirement.

Procurement

Payment/Discharge

- Shipment costs
- ■ Additional costs
- ■ ■ Evidence sufficiency

Higher charges for special services must be supported with an annotation of the Government Bill of Lading involved, or by a separate statement, containing the name of the carrier requested to perform the special service; the kind and scope of services ordered; and the signature of the person ordering such services.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Terms
- ■ ■ Ambiguity allegation
- ■ ■ ■ Interpretation

Invitation for bids (IFB) for packing, crating, storage, and movement of household goods was not ambiguous concerning basis on which "drayage" (hauling) would be paid to contractor where, although IFB included two different definitions of "drayage" in separate sections, a "NOTE" added to the bidding schedule by amendment reasonably provided that the definition of drayage contained in the statement of work would control.

Procurement

Sealed Bidding

- Bids
 - ■ Responsiveness
 - ■ ■ Determination criteria
-

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Deviation

The fact that there are a number of minor defects in a bid does not require the bid to be rejected as nonresponsive where each individual defect may be waived as a minor informality.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Alternate bids
- ■ ■ ■ Omission

Awardee's failure to submit a bid for an alternate item does not require rejection of its bid where the alternate item was not awarded.

Procurement

Bid Protests

- Settlement agreements
- ■ Payments
- ■ ■ Propriety

Where an agency admits to violating procurement regulation but fails to explain why taking corrective action is not feasible, payment to protester under agreement made to secure withdrawal of protest to allow flawed procurement to proceed would be improper.

Procurement

Bid Protests

- Allegation substantiation
 - ■ Lacking
 - ■ ■ GAO review
-

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest alleging that agency improperly classified proposed image generator as a non-developmental item is denied where agency reasonably determined that proposed modifications to already developed and available system were not major.

Procurement

Bid Protests

- Allegation
 - ■ Abandonment
-

Procurement

Bid Protests

- GAO procedures
- ■ Administrative reports
- ■ ■ Comments timeliness

Where protester does not dispute in its comments agency's response in the agency report concerning awardee's compliance with certain technical requirements, protest issues are deemed abandoned.

Procurement

Contract Management

- Contract administration
 - ■ Contract terms
 - ■ ■ Compliance
 - ■ ■ ■ GAO review
-

Procurement

Contractor Qualification

- Responsibility
- ■ Contract terms
- ■ ■ Compliance
- ■ ■ ■ GAO review

The General Accounting Office will not consider an allegation that an awardee will be unable to furnish the equipment that it has proposed, since whether an awardee can and will deliver equipment in conformance with contract requirements are matters of responsibility and contract administration.

Procurement**Competitive Negotiation****■ Discussion****■ ■ Determination criteria****Procurement****Competitive Negotiation****■ Discussion reopening****■ ■ Propriety****■ ■ ■ Best/final offers****■ ■ ■ ■ Price adjustments**

Agency's contact of offeror, after receipt of best and final offers (BAFOs), to require it to remove an outstanding request for negotiation which took exception to the agency's treatment of certain costs, constituted discussions. Having conducted discussions with one offeror, agency properly reopened negotiations to provide for submission of another round of BAFOs from both offerors.

Procurement**Socio-Economic Policies****■ Preferred products/services****■ ■ Handicapped persons**

The Government Printing Office properly canceled a solicitation for microfiche where the Committee for Purchase from the Blind and Other Severely Handicapped, pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 46-48c (1988), designated the microfiche covered by the solicitation for procurement from workshops selected by the Committee since, under the Act, agencies must obtain such designated commodities from the workshop.

Procurement**Noncompetitive Negotiation****■ Contract awards****■ ■ Sole sources****■ ■ ■ Propriety**

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the proposed sole-source award of a contract, under the authority of 10 U.S.C. § 2304(c)(1) (1988), to the only known qualified source is unobjectionable where the agency reasonably determined that only one source could supply the desired item within the critical time constraints of the procurement, which were not the result of lack of advance planning.

Procurement**Bid Protests****■ GAO procedures****■ ■ Protest timeliness****■ ■ ■ Apparent solicitation improprieties**

Protest alleging that by informing offerors of the agency's determinations regarding various transportation rates based upon the evaluation of initial proposals, and before best and final offers, agency created an improper auction or conferred an unfair competitive advantage on a competitor,

is dismissed as untimely, where protest was filed more than 10 working days after protester knew or should have known of basis for protest.

B-246788, March 31, 1992

92-1 CPD 324

Procurement

Specifications

- Performance specifications
- ■ Waiver

Conversations between protester and agency concerning minimum speed requirement for aerial targets did not operate to prospectively waive the requirement which was clearly stated in the solicitation issued after the conversations took place.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability
- ■ ■ ■ Tests

Protester's own study purporting to show that awardee's aerial target could not meet a mandatory speed requirement is insufficient to invalidate agency's certification that, based on flight tests, the target did meet the requirement.

B-246849, B-246952, March 31, 1992

Procurement

Noncompetitive Negotiation

- Industrial mobilization bases
- ■ Contract awards
- ■ ■ Propriety

Protest challenging proposed sole-source award to a mobilization base producer on the basis that item sought under solicitation is not critical is denied where record shows that the item was properly classified as critical.

Procurement

Noncompetitive Negotiation

- Industrial mobilization bases
- ■ Competitive restrictions
- ■ ■ Administrative discretion

Procurement

Noncompetitive Negotiation

- Use
- ■ Justification
- ■ ■ Industrial mobilization bases

Protest that the agency's decision to make a sole-source award to one of two mobilization base producers rather than allowing both producers to compete for the award is denied where the record shows that the decision to restrict the award to one firm was reasonably based on the agency's need to keep a producer active.

Procurement

Specifications

- Minimum needs standards
 - ■ Competitive restrictions
 - ■ ■ Justification
 - ■ ■ ■ Sufficiency
-

Procurement

Specifications

- Minimum needs standards
- ■ Determination
- ■ ■ Administrative discretion

Protest that solicitation limiting bids for aluminum oxide abrasive grain to newly manufactured grain is unduly restrictive of competition is denied where the agency properly determined that the limitation is reasonably related to user safety and performance requirements.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior dismissal is denied where protester does not show that prior decision contains errors of fact or law or information not previously considered that warrants reversal of our decision.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior dismissal of protest is denied where initial protest challenging alleged apparent solicitation improprieties was filed after the closing date for receipt of proposals.

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